

**Exhibit A**  
**Tesla's [Proposed] Surreply**

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TESLA, INC.

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

TESLA, INC., a Delaware corporation,

Plaintiff,

vs.

MARTIN TRIPP, an individual,

Defendant.

Case No. 3:18-cv-00296-LRH-CLB

**TESLA, INC.'S [PROPOSED] SURREPLY  
TO TRIPP'S MOTION TO COMPEL  
DEPOSITION OF ELON MUSK**

AND RELATED COUNTERCLAIMS

As set forth in its motion for leave, Tesla files this surreply to address arguments and materials raised for the first time in Tripp's reply brief. *See Iloane v. Commissioner*, No. 3:09-CV-00243-RCJ-(RAM), 2010 U.S. Dist. LEXIS 71808, at \*9 (D. Nev. Mar. 11, 2010) ("Because Plaintiff's reply raised issues not in his initial motion, the Court grants Defendant leave to file a surreply and will consider Defendant's arguments raised in its surreply"). Tripp's reply brief improperly introduces a deposition transcript from an unrelated case and for the first time cites to a transcript of a case management conference but omits key statements regarding this Court's ruling.

**A. Tripp quotes this Court but ignores this Court's ruling and the case law cited in Tesla's opposition.**

In his reply, Tripp selectively quotes from the transcript of this Court's December 3, 2018 case management conference to support his argument. (ECF 119 at 2.) But the full transcript, which Tesla attaches as Exhibit 1, shows the Court ordered Tripp to engage in the very discovery that Tesla demonstrated he failed to do. (ECF 112 at 8-14.)

Specifically, the Court directed "the parties to do *extensive*, you know, initial discovery before you get to the point of even doing a notice for [Musk's] deposition." (Ex. 1 at 28:8-10; emphasis added.) The Court went on to explain:

*And by that I mean, are there other employees at Tesla that can be interviewed? Is there a 30(b)(6) witness that could be deposed that may be able to answer some of the questions that are at issue? Have any interrogatories been issued? Have there been any requests for admission that have been propounded specific to Mr. Musk's statements? . . . .* So, I'm not going to make any decisions with any kind of prejudice, and I am inclined that if we get to that point we will go ahead and have some additional briefing, because I expect that the facts are going to change fairly significantly from where we are today to where we would be at that point given the discovery that I would hope would occur. . . .

So, to be clear, my ruling is essentially that the parties *need to do discovery specific to any issues related to Mr. Musk and his personal knowledge, statements, et cetera, before* that deposition notice be given . . . .

(*Id.* at 28:10-16; 29:10-13 (emphasis added.) Tripp simply did not do this. (ECF 112 at 8-14.)

Tripp then relies on the hearing transcript to argue that because Musk made some of the

1 statements in question, he can be deposed without consideration of the apex doctrine. (ECF 119 at  
2 3.) But Tripp *ignores* the many cases cited in Tesla’s opposition that did not allow depositions of  
3 high-ranking executives although they, too, had made relevant statements—*cases that were not*  
4 *before this Court at the case management hearing*. (ECF 112 at 7-8.) Tripp also ignores Musk’s  
5 declaration that his statements were entirely based on information provided to him by others. As set  
6 forth in the cases in Tesla’s opposition, statements conveying information provided by others is  
7 simply part and parcel of a CEO’s job as the “public face of the company,” and even where a CEO  
8 made relevant statements, plaintiffs must show that they cannot obtain the required information  
9 through less intrusive means. (*Id.*).

10 **B. Reliance on the deposition transcript in another litigation is improper.**

11 Tripp’s submission of a deposition from an entirely unrelated lawsuit is not only irrelevant  
12 but violates the rule that “new material does not belong in a reply brief.” *Von Brimer v. Whirlpool*  
13 *Corp.*, 536 F.2d 838, 846 (9th Cir. 1976). It is also further evidence of how far afield Tripp intends  
14 to take Musk’s deposition. Moreover, the few, highly-selective quotations plucked from a seven-  
15 hour deposition—most of which are one-liners and which appear to take at most 10 minutes in  
16 total—are *no* indication that questions were not fully answered. (In fact, the questions were fully  
17 answered in that deposition, and it was completed with no motion practice.)

18 Tripp originally said he needed four hours. Now, based on less than 10 minutes of colloquy  
19 *in another case*, he claims to need an additional three hours. This is not credible. It is similar to  
20 Tripp not deposing the key witnesses with direct knowledge of the key facts and not serving  
21 relevant discovery requests (as this Court ordered) and instead demanding Musk’s deposition.  
22 Musk should be protected from this gamesmanship.

23 **C. Conclusion**

24 Other than these improper arguments, Tripp’s reply is remarkable for its utter failure to  
25 address Tesla’s arguments and case law. His request for Musk’s deposition should be denied.  
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1 Dated: December 10, 2019

**CHARIS LEX P.C.**

2  
3 By: /s/ Sean P. Gates  
4 Sean P. Gates  
5 Attorneys for Plaintiff and  
6 Counter-Defendant Tesla, Inc.  
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**Exhibit 1 to Tesla Surreply**  
**Transcript of December 3, 2018 Case Management Conference**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA (RENO)

TESLA, INC,	)	CASE NO: 3:18-CV-00296-LRH-CBC
	)	
Plaintiff,	)	CIVIL
	)	
vs.	)	Reno, Nevada
	)	
MARTIN TRIPP,	)	Monday, December 3, 2018
	)	
<u>Defendant.</u>	)	(9:01 a.m. to 9:43 a.m.)

TELEPHONIC CASE MANAGEMENT CONFERENCE

BEFORE THE HONORABLE CARLA BALDWIN CARRY  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff:	ALLISON L. LIBEU, ESQ. JOHN C. HUESTON, ESQ. Hueston Hennigan, LLP 523 W. 6th Street, Suite 400 Los Angeles, CA 90014
For Defendant:	WILLIAM M. FISCHBACH, III, ESQ. Tiffany & Bosco 2525 E. Camelback Rd. Phoenix, AZ 85016

Court Reporter: Recorded; Digital

Courtroom Administrator: LGM

Transcribed by:	Exceptional Reporting Services, Inc. P.O. Box 8365 Corpus Christi, TX 78468 361 949-2988
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Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

Reno, Nevada; Monday, December 3, 2018; 9:01 a.m.

(Call to Order)

(Telephonic Conference)

**THE CLERK:** This District Court for the District of Nevada is now in session, the Honorable Carla Baldwin Carry presiding. This is the date set for a telephonic case management conference in Case Number 18-cv-0296-LRH-CBC, *Tesla, Incorporated* versus Martin Tripp.

Present telephonically on behalf of plaintiff, Allison Libeu. Present telephonically on behalf of defendant, William Fischbach.

**THE COURT:** Good morning, everyone. We are here today for --

**MR. FISCHBACH:** Good morning, your Honor.

**THE COURT:** -- a case conference related to the Tesla matter. In preparation for today's hearing I have re-reviewed the case minutes from the 10/1 status conference, which was at Docket Number 42. I have reviewed the stipulation and order to continue that was filed at Document Number 51. I have reviewed defendant and counterclaimant Tripp's case management report at Document Number 52, and the interim case management report filed by plaintiff, Tesla, at Document Number 53.

I first off want to thank both counsel. I am learning very quickly that what would be a -- what you would expect to see in most cases you don't, and so I really



1 appreciate how well the documents have been drafted and how  
2 thorough they are. It really does help me a lot in having  
3 these hearings, so I just want to start with that. So, thank  
4 you both for that.

5 I think the best thing to do is I'm going to -- I  
6 have a series of questions for both parties, and I'm just going  
7 to go through the issues listed, and I think I'll go off of the  
8 issues listed from Tesla's case management because there's more  
9 issues in theirs, but they overlap with the issues that have  
10 been presented by Mr. Tripp.

11 But let me start with this, and I'll start with  
12 plaintiff's counsel. Have the parties met and conferred  
13 subsequent to the filing of the case management reports? And I  
14 believe, if I'm correct, it's Ms. Libeu?

15 **MS. LIBEU:** Yes, your Honor. And just for the  
16 record, John Hueston of Hueston Hennigan has joined for  
17 plaintiffs, as well.

18 **THE COURT:** Okay.

19 **MR. HUESTON:** Good morning, your Honor.

20 **THE COURT:** Good morning.

21 **MS. LIBEU:** Counsel for both sides met and conferred  
22 since we submitted those case management reports to your Honor.  
23 I think there are some issues where, you know, we've been able  
24 to resolve, and, then, I think there are some that still  
25 remain.

1           **THE COURT:** Well, can you give me a background or at  
2 least a snapshot of what has been resolved at this point so we  
3 can just expedite -- and I should tell everybody --

4           **MS. LIBEU:** Sure.

5           **THE COURT:** -- we only have an hour, because I have  
6 another hearing at 10:00 a.m. I don't expect that we'll take  
7 that long, but I want to try to move through this as fast as we  
8 can to make sure we cover everything.

9           **MS. LIBEU:** I think, your Honor -- and Mr. Fischbach  
10 can correct me if I'm wrong -- he and I had a meet-and-confer  
11 call, and I think we have resolved most of the issues having to  
12 do with Tesla's document production for a couple of reasons.  
13 We -- since -- between the time of the report and the  
14 conference this morning, we've made an additional document  
15 production, and we -- I have discussed with Mr. Fischbach what  
16 additional documents are coming, and, then, we've also  
17 discussed other requests he has that we are in the process of  
18 looking into and meet and conferring. But I think all of the  
19 ones -- and, again, Mr. Fischbach, if he wants to raise  
20 anything, I'll let him address that, but I think all of those  
21 should be resolved.

22           **THE COURT:** Okay.

23           **MS. LIBEU:** So, then, I think we're left with really  
24 is, then, just some issues with depositions, and, then, the  
25 FRCP 35 exam that have not been resolved.

1           **THE COURT:** Okay.

2           Mr. Fischbach, do you have anything to add with  
3 respect to what's been resolved, sir?

4           **MR. FISCHBACH:** No, I think with regard to the  
5 written discovery I concur with plaintiff's counsel. We're  
6 working through it, your Honor.

7           **THE COURT:** Okay. Perfect.

8           Well, I think, in that case, what we'll do is we'll  
9 just -- but you have met and conferred with respect to the  
10 balance of the issues that were in the case management reports?

11          **MS. LIBEU:** Yes, your Honor.

12          **THE COURT:** And also with Ms. Libeu? Okay. I just  
13 wanted to make sure.

14          **MS. LIBEU:** Yes.

15          **THE COURT:** Let me just go through each one in turn,  
16 and we will -- like I said, I think -- well, depending on the  
17 issue, I will direct which counsel I'd like to hear from first,  
18 if that makes sense to the parties.

19               The first issue that I note --

20          **MS. LIBEU:** Yes, your Honor.

21          **THE COURT:** -- is what was identified under heading  
22 number one in Tesla's case management report, and it has to do  
23 with defense exceeding depositions, ten depositions. Let me  
24 just start with this. I agree with what Mr. Tripp has stated  
25 in his case management report, which was that this seemed to be

1 premature since no depositions had yet been noticed.

2           So, let me start with Ms. Libeu. Have depositions  
3 now been noticed by the plaintiff at this -- or the  
4 counterclaimant and defendant, Mr. Tripp?

5           **MS. LIBEU:** Mr. Tripp hasn't noticed any depositions.  
6 We've noticed some depositions, but we -- for the record, your  
7 Honor, we do agree that this is something that it's premature  
8 and that we think the law requires him to exhaust his ten to  
9 then determine whether he really needs more.

10           **THE COURT:** Mr. Fischbach, do you have anything to  
11 add to that, sir?

12           **MR. FISCHBACH:** Judge, I think the simplest solution  
13 is for us to do ten depositions and then concur with Tesla, so  
14 then it could be that, you know, that Tesla might be fine with  
15 a stipulation to exceed the ten dep. And we agree it's a  
16 little premature on that.

17           **THE COURT:** Okay. Well, that was sort of my sense is  
18 that until -- and I guess I would say, to the extent that -- I  
19 think you're both saying this, but I think that some of the  
20 depositions and things like that, the discovery aspects of this  
21 need to be exhausted before we get to the question of whether  
22 or not more depositions beyond the ten should be scheduled.  
23 So, I would ask that the parties exhaust that discovery at this  
24 point, but to the extent that this becomes an issue, we can  
25 certainly address that when it seems more ripe for review at

1 that point with the parties. So, we will table that issue.

2 And I should state for the parties, based on my  
3 review of everything, I do think it makes sense to have a  
4 subsequent case management conference in, say, early February,  
5 and I'll set that at that time. But, to the extent that  
6 there's issues that remain or issues that need to be revisited,  
7 we'll revisit those at that next case management to hopefully  
8 ensure that parties don't have to file extensive motions to  
9 compel and other discovery-related motions. So, that will be  
10 tabled until the next case management conference, and, to the  
11 extent that it needs to be raised at that time, we can discuss  
12 it then.

13 Moving to the issue number two, heading number two in  
14 the case management report of Tesla, and this has to do with  
15 the location of Mr. Tripp's deposition. Let me start with  
16 this. I agree that, as a plaintiff in this case, a counter  
17 plaintiff, he would be required to have his deposition in a  
18 location in the forum where the case is proceeding. I am not  
19 convinced that this is a compulsory counterclaim because it  
20 relates to issues and things that happened subsequent to the  
21 trade secrets issues that really form the basis of Tesla's  
22 claims. But with that being said, I do think that there is a  
23 middle ground for everybody to work off of, because in all  
24 my -- in all reality, he's actually being deposed as both a  
25 plaintiff but also as a defendant.

1           So, have the parties talked or discussed this any  
2 further and has any movement been made? And I'll start with  
3 Ms. Libeu.

4           **MS. LIBEU:** We discussed, your Honor, and the  
5 parties, I think, just agreed to disagree on this point on the  
6 deposition. We, obviously, think Mr. Tripp should appear in  
7 the forum, but we're amenable to another mutually convenient  
8 location, realizing that his counsel aren't in Nevada; they're,  
9 I think, in Arizona, and we'd be amenable to a different  
10 location than the forum in the United States; we just don't  
11 think it's appropriate to have to travel to Hungary to take his  
12 deposition.

13           **THE COURT:** Well, I will say that that's not going to  
14 happen. So, that -- that will not be ordered by the Court  
15 regardless of whatever the resolution would be. I think that  
16 would make absolutely no sense to have, you know, the only  
17 person who doesn't travel be Mr. Tripp, under the  
18 circumstances, especially because, as I already indicated, I do  
19 not see these as compulsory counterclaims. But I do think that  
20 there's a middle ground for the parties to work on in order to  
21 come to a better resolution.

22           I'll also state, for the record, I'm not inclined,  
23 nor will I likely grant, any type of videoconference  
24 deposition. I think that this is the type of deposition,  
25 especially if you are proceeding towards trial, where, as

1 counsel -- and I would say both for plaintiff and defendant --  
2 it's going to be important to see how he is as a witness. And  
3 that would be very difficult to see the nuances of how someone  
4 responds, the inflections of their voice, the way that they  
5 appear; it's just simply not something you can readily observe  
6 on a videoconference. So, that would not be allowed. However,  
7 I do think that the parties should be able -- and I will also  
8 say, for the record, that I think that being able to prepare  
9 Mr. Tripp would be nearly impossible if the deposition didn't  
10 occur in the United States and his counsel weren't able to sit  
11 down with him and to go over the documents.

12           So, with all of that being said, I would ask for the  
13 parties to meet and confer again to try to figure out if there  
14 is another location in the United States, and maybe Arizona  
15 would make the most sense, because that is where his counsel's  
16 offices are, and that's where he's been directed to review  
17 documents in person under the protective order. But I think at  
18 this point I think I've made it pretty clear what my  
19 inclinations are on this, so I would ask the parties to meet  
20 and confer on that again to try to come up with a resolution on  
21 how that should be handled.

22           Is this a deposition that you anticipate taking  
23 before the February time frame for another case management  
24 conference?

25           **MS. LIBEU:** It may or may not, but it certainly would

1 be around that time, assuming your Honor grants the stipulation  
2 to extend the discovery deadline. We are talking January,  
3 February for depositions, in terms of availability of  
4 Mr. Tripp. We'll, obviously, work with him on the time period,  
5 so it may or may not need to be before that February date.

6 **THE COURT:** Well, I should say -- I should have  
7 stated, for the record, I do intend to sign that. I do have  
8 some questions, though, about whether it's enough time, to be  
9 totally frank with the parties, given everything that's going  
10 on in this case. So, but at the minimum, I'm going to agree to  
11 the dates that you've already stipulated to.

12 So, Mr. Fischbach, is there anything that you'd like  
13 to add, sir, with respect to that?

14 **MR. FISCHBACH:** No, Judge. I think we'll meet and  
15 confer again, and I think Arizona does -- at least does make  
16 some good sense. I'll be candid. I mean, our -- we were  
17 hoping Tesla might agree to contribute to his travel expenses,  
18 you know, given the kind of a -- of the disparity of financial  
19 resources here, but it's something I can take up with Ms. Libeu  
20 in a separate meet and confer. We are targeting -- we're  
21 trying to kind of line up as many depositions as we can kind of  
22 back to back, and that's why we're targeting January, February.

23 In terms of an extension on the discovery time frame,  
24 that was what Tesla was willing to agree to. I tend to agree  
25 with your Honor that probably more time is going to be needed,



1 but as for now that's what Tesla would agree to, and it's very  
2 possible the issue may come up again.

3           **THE COURT:** Well, I only say that because my  
4 preference is to have people get dates that are realistic so  
5 we're not having constant motions and stipulations filed. And,  
6 in all reality, I think that, you know -- like I said, I'm okay  
7 with the dates that you have. I just want to make sure that  
8 it's enough time to get this done, because I'm not inclined to  
9 grant extension after extension after extension. And, so,  
10 that's why I would make that caveat.

11           I would ask that the parties meet and confer and to  
12 discuss even if there is any kind of fee splitting that could  
13 be agreed to by the parties. Like I said, he's not being  
14 deposed simply as a plaintiff or a counterclaimant. He's also  
15 being deposed as a defendant in the case. Now, of course, I  
16 don't know that the rule requires any of those things, but I  
17 think that there's ways to mutually agree on some way to get  
18 this to a resolution without it needing to be brought to the  
19 Court's attention again. But what I will say is this, again,  
20 meet and confer on this, and if you can't reach a resolution --  
21 if you plan on doing a deposition before our next meet and  
22 confer, I would ask that the parties file something in which  
23 it's a joint document simply stating that the parties can't  
24 agree on this particular issue and line out just in a couple of  
25 paragraphs what your respective positions are, where you're at,

1 and we can try to schedule a teleconference as soon as  
2 possible, so if you do try to get the deposition done before  
3 our next case management conference, we can have that resolved.  
4 But if you can wait until the next case management conference,  
5 if you're unable to agree, we can just address it there.

6 So, any questions, Ms. Libeu, on the Court's position  
7 on that?

8 **MS. LIBEU:** No. Thank you, your Honor.

9 **THE COURT:** And Mr. Fischbach?

10 **MR. FISCHBACH:** Well, Judge, maybe a suggestion;  
11 during this meet and confer maybe would be a good time for the  
12 parties to discuss another extension on discovery, and I don't  
13 know if the Court can hold off on signing the order until we've  
14 maybe met -- or come up with a different date, because --  
15 because I'll agree, doing kind of repetitive extensions are  
16 usually kind of a -- are problematic, and I'd prefer that we  
17 kind of get together and stake out a good discovery cutoff date  
18 that's realistic and then kind of back that into a subsequent  
19 filing.

20 **THE COURT:** Okay. Well, let's table the question of  
21 the extension and stipulation until the very end, and then we  
22 can discuss that, and that way it can give Ms. Libeu an  
23 opportunity to speak to that issue. But let's move to the next  
24 issue in the case management. But thank you for that,  
25 Mr. Fischbach. I do appreciate that.

1           With respect to the deposition of the wife, I agree  
2 Rule 45 does not extend to overseas depositions. I don't know  
3 that your subpoena would even be effective. It's been my  
4 experience you would have to go through the process of getting  
5 what we call an MLAT in order to be able to do that. That's a  
6 difficult thing to do. I also am unclear as to whether or not  
7 she really is going to be called as a witness or whether or not  
8 she simply was placed on the initial disclosure list. However,  
9 with that being said, she certainly appears to be somebody that  
10 would have information that would be relevant to the case,  
11 particularly as it relates to Mr. Tripp's alleged emotional  
12 distress, any pressure that this put on the marriage or impact  
13 to him; you know, she would be able to talk about her  
14 observations in terms of how this affected him. And with that  
15 being said, spousal privilege, which is something brought up by  
16 Tesla, that is a very narrow privilege in the state of Nevada.  
17 It only extends to communications. So, specifically, things  
18 that were said between the parties would be privileged under  
19 spousal privilege. However, to the extent that she observed  
20 anything, she experienced anything personally, anything of that  
21 nature, that's all fair game. That is not covered by  
22 privilege.

23           So, I guess, the question -- and I'll start with  
24 Mr. Fischbach as to this, which is, is this a witness that you  
25 anticipate actually calling and relying on for purposes of this

1 case at trial?

2 **MR. FISCHBACH:** Well, we're not entirely certain  
3 right now, your Honor. We did identify her as a party with  
4 knowledge, but for purposes of this call, I don't want to  
5 (indisc.) position that we don't intend to call her.

6 **THE COURT:** Okay.

7 **MR. FISCHBACH:** So, we would certainly reserve the  
8 right to call her. And to that end, I do believe that we would  
9 invoke the privilege with respect to any communications, but I  
10 agree with the Court that, you know, what she observed, what  
11 she herself experienced, I think that is fair game to the  
12 extent she was called as a witness in trial.

13 **THE COURT:** Is there any claim in this that relates  
14 to any sort of loss of consortium type claim? I don't recall  
15 seeing it that specifically alleged, but is that part of the  
16 emotional distress and the pressure on the marriage that's -- I  
17 apologize; this is so personal, but I do think it goes directly  
18 to who else would be a witness to that other than Mr. Tripp.  
19 So, can you elaborate on that at all, Mr. Fischbach, or is this  
20 not a good time for that?

21 **MR. FISCHBACH:** Oh, it's a good time, Judge. You  
22 know, loss of consortium is an interesting claim, because it's  
23 a derivative claim, so, obviously, she's not asserting a loss  
24 of consortium claim. And to the extent, you know, Mr. Tripp  
25 is -- I wouldn't say we're asserting a -- I don't know that

1 Mr. Tripp could necessarily assert a loss of consortium claim  
2 because it did claim it's not derivative. But I do suspect  
3 that he would testify that it's put a stress on the marriage.  
4 But, other than that, I think that's going to be the extent of  
5 it.

6 **THE COURT:** I guess what I was thinking in terms of a  
7 middle ground on this, to the extent that this particular  
8 individual could be a witness, I would suggest that Tesla  
9 propose interrogatories or even a written deposition of sorts  
10 to this particular witness to get information as to what she  
11 really does know and what would likely be invoked in terms of  
12 privilege, and then we can revisit whether or not we need to  
13 address this in any more depth beyond that.

14 Is there any objection to that, Ms. Libeu?

15 **MS. LIBEU:** No, I think that's fine, your Honor. We  
16 can do that and then address it secondarily. In addition, I  
17 think Mr. Fischbach and I can probably meet and confer on a  
18 deposition, whether this one might be one where telephonic  
19 would be appropriate.

20 **THE COURT:** Okay. Well, that -- let's add that to  
21 your list, for lack of a better word, for the meet and confer  
22 as to whether or not that's something that you can start to  
23 work on to resolve. My guess is that even at the meet and  
24 confer that might be a bit even premature until you've  
25 propounded some deposition -- or at least some questions

1 through interrogatories or even a written deposition before  
2 that. But I would suggest that you put that on the list, and  
3 to the extent that that can't be resolved by our February meet  
4 and confer or case conference, then we can address that in more  
5 detail at that point.

6 Anything further on that, Ms. Libeu?

7 **MS. LIBEU:** No. Thank you, your Honor.

8 **THE COURT:** Mr. Fischbach?

9 **MR. FISCHBACH:** No, your Honor.

10 **THE COURT:** Okay. That takes us to the mental exam  
11 of Mr. Tripp. I think we have two last issues. And I have to  
12 be frank. I think that given the fact that this particular  
13 individual is making a claim of intentional infliction of  
14 emotional distress, my inclination is that an independent exam  
15 would make sense. The question I have for Mr. Fischbach is,  
16 are -- is he alleging continued emotional distress or emotional  
17 distress that -- you know, prospective emotional distress, as  
18 well as what he went through at the time? Because I think that  
19 may change the analysis to some extent.

20 Mr. Fischbach?

21 **MR. FISCHBACH:** You know, Judge, it's a tough  
22 question, as -- as I'm not -- I don't have a degree in  
23 psychology or psychiatry. Obviously, the events themselves  
24 were very traumatic for Mr. Tripp. You know, does he still --  
25 does it still kind of impact him today? Yes, it does, but I

1 think that's -- that can be said about any traumatic experience  
2 that you had in the past. I mean, that -- you know, that --  
3 speaking as a veteran, that's kind of the nature of PTSD. If  
4 you have a traumatic event, and it typically lingers, you know,  
5 for various periods and various degrees of intensity. But  
6 we're not making a claim that he is, for example, declaring  
7 future mental health treatment. He is not under the care of  
8 any kind of mental health care provider at this point in time.  
9 And, so, that's why we thought that the Rule 35 examination was  
10 going a little too far given the extent of the claim.

11 **THE COURT:** Well, I guess that, with that  
12 explanation, I tend to agree. I think that the question of  
13 having a medical exam really relates more to what is currently  
14 or ongoing, you know, medical issues related to a claim;  
15 whereas, if we're talking strictly about things that are more  
16 specific to the past, it seems to me that -- or the discovery  
17 process itself would -- or at least eliminate those issues  
18 through medical records or other types of, you know, evidence  
19 that relates specifically to how his mental state was around or  
20 about the time that all of this was happening.

21 So, my question to Ms. Libeu is, has there been  
22 discovery requests propounded related to his medical history,  
23 his medical records? Have any of those things been provided,  
24 and is there a need at this time for that medical exam in light  
25 of what you've received or not received?

1           **MS. LIBEU:** Two things, your Honor. We have  
2 propounded discovery on that issue. They have produced no  
3 medical records because they've said he never sought medical,  
4 so there is no documentary evidence on this issue whatsoever.  
5 And we've also asked questions about whether he's ever been  
6 prescribed medication, taking medication, whether prescribed or  
7 not, those things, and all of the answers have been no, no, no.  
8 And there is no real evidence, other than what's in his head.

9           And, additionally, I will say in paragraph 98 in the  
10 counterclaim, Mr. Tripp alleges that he has suffered and,  
11 quote, "continues to suffer emotional and mental distress and  
12 pain and suffering." So, not only is it something that we can  
13 only get from a examination of him, he does actually allege  
14 continuing emotional distress in his counterclaims.

15           One other thing that we have been waiting on but  
16 haven't received is in the initial disclosures there's supposed  
17 to be a calculation of what he claims his damages are. The  
18 initial disclosures -- we've gotten a few amended sets, but the  
19 damages calculation still says that Mr. Tripp is calculating it  
20 and will get it to us at some point. So, we still haven't  
21 received that. So, we've really gotten no information from  
22 him, which is why we need the exam.

23           In addition, he's not -- he's alleging some sort of  
24 compensatory damages that we don't know, and punitive. So, to  
25 fully and fairly be able to defend ourselves from what his



1 claims are, we have propounded discovery. There isn't anything  
2 other than what's in his head for us to get at. This is why we  
3 need the -- the exam.

4 **THE COURT:** Mr. Fischbach? Any response?

5 **MR. FISCHBACH:** Several, Judge. I think that  
6 whatever is in Mr. Tripp's head can be obtained via a  
7 deposition. He doesn't need to sit for an independent medical  
8 examination for that purpose. In fact, we are particularly  
9 concerned that Tesla would (indisc.) fact and, you know, misuse  
10 it tactically and say that there is something that he's -- that  
11 he -- she's somehow been trying to (indisc.) some kind of  
12 mental deficit or liability, and as a result, the judge made  
13 him sit for a mental exam. I'm very concerned that that could  
14 be used to prejudice Mr. Tripp, all for very, very little  
15 evidentiary gain to Tesla.

16 With regard to the damages calculations, I think your  
17 Honor is aware that, you know, unlike a liquidated claim for  
18 damages in a breach of contract case or some -- or any other  
19 kind of commercial case, that the case law is very clear that  
20 damages in cases are defamation, (indisc.) invasion of privacy,  
21 intentional infliction of emotional distress; those are  
22 presumably within the province of the fact finder. And it's  
23 true there are times that you can assert, you know, a financial  
24 loss. For example, you could allege that the defamatory  
25 statement caused you to miss out on employment or something

1 like that. But we're not -- we're not claiming that. With  
2 regard to punitive damages, that -- that goes more to the state  
3 of mind of the -- to Tesla than it does to Mr. Tripp.

4           So, again, Judge, I think at this point in time a  
5 Rule 35 exam, at a minimum, is highly premature. And I don't  
6 think it's going to be necessary given that we're not asserting  
7 that Mr. Tripp needs long-term mental health healthcare  
8 treatment; we're not intending to call a psychiatrist, so -- to  
9 talk about the impact of Tesla's conduct. If either of those  
10 were true, then a Rule 35 exam might make good sense, but not  
11 under these circumstances.

12           **THE COURT:** Well, I, unfortunately, do have some  
13 experience with litigating the intentional infliction of  
14 emotional distress claims, and what I would say is that I think  
15 it's very difficult to do that under Nevada law absent some  
16 medical records that show that there really was extreme and  
17 severe emotional distress. And when you're trying to defend a  
18 case like that, without any sight of medical records, I think  
19 that puts the defense in this case, which would be Tesla  
20 because this is a counterclaim, at a very extreme disadvantage.  
21 And how you would even deal with that if you can't get into the  
22 question of what really is the emotional distress, because  
23 that's been put at issue now by Mr. Tripp, not Tesla. So, to  
24 the extent --

25           **MR. FISCHBACH:** (indisc.)

1           **THE COURT:** Well, let me finish.

2           **MR. FISCHBACH:** It --

3           **THE COURT:** Let me finish.

4           **MR. FISCHBACH:** I'm sorry.

5           **THE COURT:** So, to the extent that that's been put at  
6 issue, I think that, at the very minimum, before we can really  
7 discuss this in any real substance, is there needs to be some  
8 discovery. What is the status of his medical records and  
9 information related to that? I mean, has he sought out any  
10 kind of mental, you know, health assistance as a result of what  
11 he claims to be the actions of Tesla? Because if that isn't  
12 the case, then I think that there is a defense to whether or  
13 not this is a severe and extreme emotional distress such that  
14 it would be compensable under Nevada law.

15           So, I'm going to ask the parties do this. I would  
16 ask that Mr. Fischbach respond to the discovery requests that  
17 have been made by Tesla as it relates to the medical records to  
18 provide them that information. I would also want to make sure  
19 that any evidence that you have will lead specifically to  
20 whether or not this has been a severe and extreme, what that  
21 conduct is exactly, and how that's been a severe and extreme  
22 emotional distress, you know, what those symptoms have  
23 essentially resulted in, and at that point the parties should  
24 meet and confer to discuss whether or not Tesla still believes  
25 that it needs this mental examination. And if at that point

1 the parties can't agree, then we'll have this discussion, but  
2 one thing I would like to do is to make sure that if we are  
3 going down that road, that this is scheduled at the same time  
4 that Mr. Tripp is already in the United States. So, we need to  
5 make sure that we get this resolved ahead of his deposition.

6 So, I guess, with that being said, this would be  
7 another issue, I think, for the parties to meet and confer  
8 over, but I think it requires first that Mr. Fischbach and the  
9 plaintiff provide the necessary discovery to Tesla for Tesla to  
10 be able to review that before you meet and confer over what  
11 would necessarily be required for a Rule 35 examination.

12 Is there any questions for plaintiff on that,  
13 Ms. Libeu?

14 **MS. LIBEU:** No questions, your Honor; only just a  
15 comment that we have asked for medical records and we've been  
16 told there aren't any. So, I don't know what, if anything,  
17 Mr. Fischbach can provide in that area.

18 **THE COURT:** Okay. Mr. Fischbach, do you want to  
19 respond to that?

20 **MR. FISCHBACH:** Frankly, Judge, I was going to raise  
21 the same concern, that there are no medical records, he has not  
22 sought any kind of treatment. He may do so in the future, and  
23 if he does, we'd, obviously, disclose those records. So,  
24 it's -- there is nothing to provide in response to a request  
25 for medical records.

1           **THE COURT:** Have there been any interrogatories that  
2 have been propounded specific to these questions of the  
3 elements under the IIED claim?

4           **MS. LIBEU:** Yes, your Honor. We have propounded  
5 interrogatories on whether he sought medical treatment, what  
6 he's done in terms of, in the past, whether he's had similar  
7 issues, whether he's taken medication, whether prescribed or  
8 not, for his alleged emotional distress, and all of the answers  
9 have essentially been no, no, no. He hasn't alleged an  
10 emotional -- he hasn't alleged that he has an emotional  
11 illness. So, that's something we do need to confer on given  
12 that the answers are a little conflicting with the fact that  
13 he's got an emotional distress claim out there.

14           **THE COURT:** Well, there's -- you know, and to be  
15 clear on the record, there is a distinction between having  
16 emotional distress that would be part of and parcel to, you  
17 know, the defamation and false-light related claims. There is  
18 another, different standard that would apply in the IIED round,  
19 which is going to be severe and extreme emotional distress.  
20 So, those two things are actually different, especially under  
21 Nevada law.

22           So, I think at this point why don't you again meet  
23 and confer with this issue, because, I have to be honest with  
24 you, based on what I'm hearing just from counsel, I think an  
25 IIED claim without any evidence to really establish severe and

1 extreme emotional distress, where there's no medical records,  
2 there's no history, no evidence that someone actually sought  
3 out any help as a relation to that particular claim, that would  
4 be a hard claim to survive on motion for summary judgment.  
5 Just -- just throwing that out there. I'm not necessarily the  
6 one that's going to decide that, but that would be a difficult  
7 claim to pursue.

8           So, I think at this point, I think the parties should  
9 meet and confer over exactly what it is that -- how this  
10 claim's going to proceed. And I do think that, Mr. Fischbach,  
11 there is going to have to be some disclosure and discovery as  
12 to what exactly it is that is being alleged is so severe and  
13 extreme that would support an IIED claim. And if you can't  
14 establish that, that's a problem bigger than the emotional or  
15 the mental examination question. And at that point I'm not  
16 sure if Tesla would want to have the mental examination,  
17 because it may not be necessary if there can't be a showing  
18 that there was extreme and severe emotional distress in the  
19 first instance.

20           Now, to the extent that there's other emotional  
21 distress that's not severe and extreme, I guess the question  
22 again goes back to whether or not there's allegations of future  
23 emotional distress or future damage that was done. In that  
24 type of instance, I'm not sure that a mental examination is  
25 really necessary to go down that road. Based on what's been

1 said, I know that there was the allegation in -- what is it --  
2 paragraph 93, but I do think that the parties should meet and  
3 confer and try to resolve some of these issues, and we can  
4 revisit this at the next case management conference. I guess  
5 at this point I would ask that Mr. Tripp's deposition not be  
6 scheduled until after that time so we can resolve some of these  
7 issues to the extent they need to be resolved.

8 Is there any question on that, Ms. Libeu?

9 **MS. LIBEU:** No, your Honor.

10 **THE COURT:** Mr. Fischbach, is there anything you'd  
11 like to add, sir? I'm sorry; I think I may have cut you off.

12 **MR. FISCHBACH:** No, your Honor.

13 **THE COURT:** Okay. Perfect.

14 That takes us, then, to the deposition of Elon Musk.  
15 Let me state this for the record. I do not believe that he  
16 would fall within the apex rule. And the reason for that is  
17 this is not a case where a corporation is being sued in  
18 relation to something that this particular individual doesn't  
19 have personal knowledge of. The very allegations that, as I  
20 read them, in the counterclaim particularly relate specifically  
21 to statements, emails, tweets that came directly from Mr. Musk.  
22 So, to the extent that he has personal knowledge of the actions  
23 taking place in this case and, in particular, the fact that his  
24 own statements, as I understand them, are what raised the basis  
25 for the defamation and false-light claims themselves, that

1 makes this different than most cases where the apex rule has  
2 been used to prevent the deposition of a CEO or other high-  
3 level corporate executive. So, in this particular case, I do  
4 not agree that he would be protected under the apex rule.

5 Now, with that being said, I do think that we are not  
6 going to allow an extensive deposition; we're not going to  
7 allow the deposition to be taken in Kansas or something to, you  
8 know, somehow harass or otherwise take away Mr. Musk from his  
9 daily activities as the CEO of Tesla.

10 So, with that being said, is there anything,  
11 Ms. Libeu, that you would like to add to this issue?

12 **MS. LIBEU:** Just very briefly, your Honor.

13 Mr. Musk's deposition hasn't been noticed or  
14 subpoenaed, so we think technically this issue isn't even ripe  
15 for resolution. What we would like to have is, once it's  
16 noticed, have the opportunity to file a formal briefing on the  
17 issue, including to address the issues on ways in which we  
18 think the deposition, if ordered, should be limited so it  
19 doesn't turn into something that is beyond really the pale of  
20 this case.

21 **THE COURT:** Well --

22 **MS. LIBEU:** We would -- we would request that  
23 opportunity.

24 **THE COURT:** Well, I guess, I -- but the question  
25 would be, what more would you provide that you haven't already



1 provided in the case management report?

2 **MS. LIBEU:** Right. (indisc.)

3 **THE COURT:** I actually did some fairly significant  
4 independent research on this question before I got here today,  
5 and I've read what you filed, so I'm not sure that there is a  
6 lot more to add beyond what's already been filed, and I'm not  
7 saying I'm not going to allow it, but let me just put that out  
8 there.

9 Mr. Fischbach, what is your --

10 **MS. LIBEU:** Fair enough.

11 **THE COURT:** -- position on this?

12 **MR. FISCHBACH:** Well, Judge, we haven't formally  
13 noticed any depositions because we were trying to identify  
14 actual dates with plaintiff's counsel. The depositions that  
15 were noticed by opponent were done unilaterally -- unilaterally  
16 without consulting us on dates. So, I tend to agree with the  
17 Court that I don't know that much else needs to -- obviously,  
18 we will go out of our way -- I shouldn't say go out of our way,  
19 but we -- we will not notice his deposition at an inconvenient  
20 location. I suspect it would either be Nevada or potentially  
21 Northern California where the Tesla headquarters is. If the  
22 plaintiff wants to brief the issue, I suppose that's their  
23 prerogative, but I simply agree with the Court on this.

24 **THE COURT:** Well, let me state this for the record.  
25 This is what I would like to see done. Before we're going to

1 get into -- and I think I am inclined to allow additional  
2 briefing if we get to that point. But before we get to that  
3 point, I think both parties -- and I think I am in agreement  
4 that is a little bit premature given that it hasn't been  
5 noticed yet. However, I do agree with Tesla to the extent that  
6 there are limitations that should be placed, and so with  
7 those -- with that in mind, I'm not placing limitations on the  
8 deposition, but I am directing the parties to do extensive, you  
9 know, initial discovery before you get to the point of even  
10 doing a notice for his deposition. And by that I mean, are  
11 there other employees at Tesla that can be interviewed? Is  
12 there a 30(b)(6) witness that could be deposed that may be able  
13 to answer some of the questions that are at issue? Have any  
14 interrogatories been issued? Have there been any requests for  
15 admission that have been propounded specific to Mr. Musk's  
16 statements? Because if he makes admissions, then there may not  
17 be a need for the deposition, in and of itself, and it may be  
18 avoided entirely.

19           So, I would ask that the parties do that, that  
20 discovery, before you get to that point. If at that point,  
21 after the discovery has been completed, that you feel that you  
22 could do to get to the information you may need and you still  
23 believe you need to take Mr. Musk's deposition, then go ahead  
24 and notice it up at that point, or at least meet and confer on  
25 it and then notice it up, and then if there's still a

1 continuing objection -- because at that point Tesla may not  
2 have an objection to a limited two- or three-hour deposition --  
3 then we can revisit this issue. So, I'm not going to make any  
4 decisions with any kind of prejudice, and I am inclined that if  
5 we get to that point we will go ahead and have some additional  
6 briefing, because I expect that the facts are going to change  
7 fairly significantly from where we are today to where we would  
8 be at that point given the discovery that I would hope would  
9 occur.

10 So, to be clear, my ruling is essentially that the  
11 parties need to do discovery specific to any issues related to  
12 Mr. Musk and his personal knowledge, statements, et cetera,  
13 before that deposition notice be given, and I'll leave it to  
14 the parties as to what that discovery needs to be, but I have  
15 already given you some suggestions. If at that point you  
16 believe you need to have the deposition, I would first ask that  
17 you meet and confer to discuss with Tesla whether or not you  
18 can come to an agreement on how that would be handled, and if  
19 you can't, then I would ask that the parties -- let's -- I'm  
20 assuming this is not going to happen before February. Is that  
21 probably fair to say, Ms. Libeu?

22 **MS. LIBEU:** I think that's probably fair to say.  
23 Yes, your Honor.

24 **THE COURT:** Mr. Fischbach?

25 **MR. FISCHBACH:** I think that's probably correct, your

1 Honor.

2           **THE COURT:** Well, let's plan on this. We'll at  
3 least -- we'll include this on our agenda for our next case  
4 management conference and see where we're at. If it's still at  
5 a point where it can't be resolved or it's still pending  
6 because of additional discovery that needs to be needed, then  
7 I'll go ahead and address how I want the parties to deal with  
8 that from a motion practice perspective at that point. So, up  
9 to that, that would be my order, as I've already indicated.

10           Is there -- and I'm sorry if I'm not being clear, but  
11 is that clear, Ms. Libeu, what I'm indicating I would like the  
12 parties to do?

13           **MS. LIBEU:** It is, your Honor.

14           **THE COURT:** Okay. Mr. Fischbach, any questions from  
15 you, sir, or any additional comments?

16           **MR. FISCHBACH:** No, your Honor.

17           **THE COURT:** Okay. I think that covers everything  
18 that we had in the case management reports. Is there anything  
19 specific as to issues between the parties right now, Ms. Libeu?  
20 And without getting into the stipulation and order, is there  
21 anything else that Tesla would like to raise at this time?

22           **MS. LIBEU:** Nothing, your Honor.

23           **THE COURT:** Okay. Mr. Fischbach, is there anything  
24 additional from Mr. Tripp that you'd like to raise before we  
25 get to the question of the stipulation?

1           **MR. FISCHBACH:** Nothing, your Honor.

2           **THE COURT:** Okay. That takes us back to the question  
3 of how long an extension of time should be granted. I've  
4 already kind of indicated my thoughts on it. Mr. Fischbach has  
5 already given his thoughts, but, Ms. Libeu, I'd like to give  
6 you an opportunity to speak to these issues.

7           **MS. LIBEU:** Certainly, your Honor. Very briefly.

8           I'm sure that you have found, in cases that you have,  
9 that no matter where you set for the discovery cutoff, that  
10 things will lag up until the last minute. Our strong  
11 preference is, of course, not to drag out this case longer than  
12 necessary. We believe that the initial scheduling order is  
13 compliant with the Nevada local rules, which I know Nevada  
14 District Court (indisc.) strong preference on having cases  
15 completed within a discovery period of 180 days. This,  
16 obviously, extends that, and we're more than happy to agree to  
17 that, but we don't think this is a case where we need another  
18 180 days. We think another two months here is appropriate, in  
19 that the parties have done document discovery and written  
20 discovery already, so we're really talking about -- and expert  
21 discovery. So, we're really talking just about depositions  
22 that remain left to be completed in the next -- it's really  
23 three months from now. And we think the parties can work  
24 together -- they've worked together well so far -- to get those  
25 scheduled and completed within the two-month period. So, we

1 think that that's an appropriate length of time.

2           **THE COURT:** Okay. And I appreciate that, and I tend  
3 to agree that when you have a little bit of fire under your  
4 feet you tend to move a little quicker, and when you don't,  
5 it's easy to let things kind of go to the wayside.

6           So, what I'll do is this. I will go ahead and sign a  
7 stipulation order as it's drafted with the dates that we have.  
8 As I've already indicated, I am going to schedule another case  
9 management conference for the beginning of February.

10           Ms. Clerk, can you give us a date?

11           **THE CLERK:** Yes, your Honor. February 6th, 2019, at  
12 9:00 a.m.

13           **THE COURT:** Does that work for you, Ms. Libeu, and  
14 the plaintiff?

15           **MS. LIBEU:** What did you say? The 6th or the 5th?  
16 I'm sorry. I didn't hear.

17           **THE COURT:** The sixth.

18           **MS. LIBEU:** Perfect.

19           **THE COURT:** And, Mr. Fischbach, will that work for  
20 the defendant?

21           **MR. FISCHBACH:** Yes, your Honor.

22           **THE COURT:** Okay. And what we can do at that time is  
23 discuss where we're at, as, obviously, we've already kind of  
24 discussed anyway, and if there is a need to discuss any further  
25 extensions at that point we can do that. I think that that

1 makes sense, and I appreciate the statements from Ms. Libeu on  
2 that, those issues.

3 I guess, at this point, I don't have anything  
4 further. Is there anything further from the plaintiff?

5 **MS. LIBEU:** No, your Honor.

6 **THE COURT:** From the defense?

7 **MR. FISCHBACH:** Nothing at this time, your Honor.

8 **THE COURT:** Okay. Thank you both very much. And,  
9 again, I want to again thank you for your filings and how  
10 thorough and well done those are. I also want to thank you  
11 both for working so well together. I have noticed throughout  
12 this litigation that it's been very congenial and very  
13 professional, and given the circumstances of this case, I could  
14 see where it would be very easy for that not to be the case.  
15 So, I do very much appreciate it, and with that, I hope you  
16 both have a great day, and we'll be in recess.

17 **MS. LIBEU:** Thank you, your Honor.

18 **MR. FISCHBACH:** Thank you, your Honor.

19 **(Proceeding was adjourned at 9:43 a.m.)**  
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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written over a horizontal line.

Signed

October 10, 2019

Dated

*TONI HUDSON, TRANSCRIBER*